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IN THE

Supreme Court of the United States

DOUGLAS SPECTOR, et al.,
Petitioners,

vs.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* INTERNATIONAL COUNCIL OF CRUISE LINES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The International Council of Cruise Lines ("ICCL") is the leading nonprofit trade association representing the interests of its 16 member lines and more than 95 associate member companies in a diverse array of domestic and international forums. ICCL's members include the largest passenger cruise lines trading in ports worldwide. Among its associate members are industry suppliers and strategic business partners. Each year ICCL's cruise ships carry over ten million passengers on more than 115 ships, the largest of which carry more than thirty-five hundred guests per voyage.

In addition to U.S. citizens, ICCL vessels embark many foreign citizens, both in the U.S. and abroad. Of the more than 100 foreign ships visiting U.S. ports annually, some routinely embark or disembark their passengers. Others do so occasionally or only rarely. Some members' vessels embark and disembark passengers abroad but enter U.S. waters only for port visits. The members' ships vary in size, age,[2] nation of construction and registry.[3] All but two are designed, built, classed, certified and flagged abroad. All are subject to a stringent and complex array of international shipbuilding and operational laws.

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[1] The parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation or submission.

[2] Unlike shore side hotels and other buildings, the average life span of an oceangoing ship is approximately 35 years. The average life of ICCL members' ships is considerably less.

[3] Respondent's ship at issue in this case is registered in the Bahamas. More than 75 ICCL ships are registered in the Bahamas, and some 85 in U.K. Commonwealth countries.

ICCL member lines have diligently provided access for guests with disabilities. Despite the unique challenges inherent in the shipboard environment, all ICCL lines, including Respondent, endeavor to accommodate wheelchairs, electric mobility devices, service animals, auxiliary aids and other special needs. All ICCL members, including Respondent, have modified practices and procedures in an effort to provide full access. However, numerous technical issues are associated with reconciling the need for accessibility on cruise ships with foreign and international safety, shipbuilding and accessibility laws. Title III injunctive actions have nonetheless been brought against most foreign cruise ships, leaving ICCL's members and the courts in a legal quagmire as a result of the statutory and regulatory void.

SUMMARY OF ARGUMENT

Unless Congress first determines whether and under what circumstances Title III applies, lawsuits seeking modifications aboard foreign ships are misguided. Congress, and not the courts, should determine how to resolve conflicts between U.S. accessibility standards and applicable foreign and international laws. Congress has already amended Title I of the ADA, governing employment of persons with disabilities, to cover extraterritorial application *and* conflicts with foreign law. Congress amended the Air Carrier Access Act to include foreign aircraft *and* limit the authority of the regulatory agencies to interfere with foreign laws. Foreign cruise lines deserve an equally deliberate legislative process.

The confusion over whether and to what extent the ADA applies to foreign ships has fomented litigation in many jurisdictions. Regardless of their good intentions, advocacy groups and individuals seek to impose their own accessibility standards on this international industry. Federal courts are

being asked to guess what Congress and the regulators intend to be the required level of accessibility when U.S. citizens travel on foreign ships, resulting in forum shopping and inconsistent rulings. This Court should not permit the removal of architectural barriers on foreign ships unless and until a statutory framework is created specifying the extent of Title III's application, and a clear mechanism is established for resolving conflicts with other laws. The DOJ and DOT must thereafter promulgate regulations that provide cruise lines with the opportunity to voluntarily comply with specific standards before being sued.

Nowhere has Congress stated or implied that Title III applies to foreign facilities that either visit the U.S. or are visited by Americans. The legislative history is devoid of any such discussion. Congress evidently never considered the potential for a foreign facility, such as a cruise ship, to relocate to the U.S. on a long-term or only occasional basis. Therefore, the legislature never addressed the reach of Title III at sea. Absent an expression of Congress's intent, ignoring the well-established presumption against extraterritorial application of U.S. laws in this situation is unprecedented and unworkable. A ship's design, operation and construction certainly involve its "internal affairs." Accordingly, the legal presumption requiring an expression of congressional intent is directly implicated. The adoption of an *ad hoc* common law choice of law analysis to determine if the ADA applies to each foreign ship, as urged by Petitioners and their *amici*, wrongly usurps Congress's authority to so specify. A case-by-case approach by the courts, in lieu of any direction from Congress, fosters even greater confusion over what standards apply.

Congress directed the DOT and DOJ to enact specific accessibility regulations for covered entities to give the Act meaning. The effective date of the ADA was delayed to allow time for voluntary compliance. Under the

Administrative Procedures Act ("APA"), adopting such regulations requires public notice and comment by interested parties. This process was duly completed for land-based facilities by the DOT and DOJ within the congressionally-prescribed deadline. Covered entities operating facilities on land knew the precise requirements so they could comply. In the cruise industry, no regulations addressing construction, alteration, barrier removal, or policies and procedures have been adopted for any ships, let alone those designed, built and flagged abroad. The majority of cruise ships calling in the U.S. are foreign, so the failure of the DOT or DOJ to enact regulations points to the agencies' own confusion over the extent of Title III's reach.

These federal agencies, with expertise to address access issues, have consistently stated their land based *ADA Accessibility Guidelines for Buildings and Facilities* ("ADAAG" regulations) do not apply at sea, due to the substantial differences between buildings and ships. In addition to the obvious physical features, oceangoing vessels must be self-sufficient in a marine casualty for the safety of *all* passengers. Ships do not have recourse to the emergency resources available to land based facilities. The vital distinctions dictate particular design, operation and safety considerations. Nonetheless, federal courts, ill-equipped for the task, are being asked to reconcile conflicting proposals of interested parties with international shipbuilding and safety mandates. The resulting dilemma is amplified by the continuous movement of cruise ships to foreign and domestic jurisdictions, the unique legal and physical environments in which they operate, and the Constitutional requirements of maritime uniformity and due process.

ARGUMENT

I. CONGRESS SHOULD DETERMINE WHETHER AND WHEN TITLE III APPLIES TO FOREIGN SHIPS OPERATING INTERNATIONALLY

Neither Title III nor its legislative history includes a single word applying the Act extraterritorially.[4] That Congress never envisioned applying Title III beyond facilities permanently located in the U.S. is corroborated by the lack of reference to conflicts with foreign laws. Nor is there mention of the impact of unilaterally extending U.S. accessibility standards to international maritime commerce. For courts to disregard these important considerations when foreign ships enter U.S. waters, especially with regard to physical features as Petitioners suggest, wrongly displaces the legislature's role.

Congress had no difficulty expressing its intention to extend portions of the ADA extraterritorially when it chose to do so. Title I of the same Act, governing employment, was amended in 1991 to include several provisions addressing extraterritorial application.[5] Congress limited the reach of Title I by specifying discrimination claims could not be brought for actions required by foreign law. (42 U.S.C. § 12112(c)(1)). These amendments evidence Congress's

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[4] Although the statute contains an exhaustive list of "public accommodations" and "specified public transportation," it does not mention ships, let alone foreign ships. 42 U.S.C § 12181(7), (10). *See also* House Comm. on Educ. & Labor, 101st Cong., Legislative History of Public Law 101-336 (1990). In over 3000 pages of published legislative history no mention is made of cruise ships.

[5] The definition of "employee" includes U.S. citizens working abroad. (42 U.S.C. § 12111 (4)). Congress extended Title I to "covered entities in foreign countries" (42 U.S.C. § 12112(c)), and "control of [a foreign] corporation" by an American employer (*Id.*, subsection (2)). Title I prescribes criteria for determining whether an American employer controls a foreign corporation (*Id.*, subsection (2)(C)).

intent to apply Title I only to Americans working in foreign countries for companies controlled by Americans. Congress was also careful to recognize the obligations imposed on covered entities by foreign laws.

In the 2000 amendments to the Air Carrier Access Act ("ACAA"), prohibiting discrimination against disabled passengers traveling by air, Congress specifically included foreign aircraft. (49 U.S.C. § 41705(a)).[6] Lawmakers recognized the potential for conflicts with foreign laws and the need for uniform accessibility standards. Congress therefore required the DOT to "act consistently with obligations of the United States Government under an international agreement," "consider applicable laws and requirements of a foreign country," and "not limit compliance by an air carrier with obligations or liabilities imposed by the government of a foreign country . . ." 41 U.S.C. § 40105(b)(1)(a), (b), and (c).

These amendments to Title I and the ACAA demonstrate Congress knows how to apply U.S. law extraterritorially in situations strikingly similar to the present case. Title III demonstrates just as clearly the absence of any intent to apply the ADA to accommodations operated beyond the U.S., such as foreign cruise ships.[7] The DOJ long ago

[6] Congress further required the DOT to "work with appropriate international organizations and the aviation authorities of other nations to bring about the establishment of higher standards for accommodating handicapped passengers in air transportation, particularly with respect to foreign air carriers that code-share with air carriers." (106 P.L. 181, § 707(c), 114 Stat. 158, April 5, 2000).

[7] In response to this Court's holding in *EEOC v. Arabian American Oil Co. ("Aramco")*, 499 U.S. 244 (1991), that Title VII did not apply extraterritorially, Congress amended both Title VII and *only* Title I of the ADA, providing limited foreign application. Title III was not amended, even after the potential of international implication was brought to Congress's attention through the *Aramco* decision. *Aramco* noted: "Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." 499 U.S. at 258. *Aramco* listed various examples and concluded "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." 499 U.S. at 259.

conceded Title III does not have extraterritorial reach because of the lack of congressional expression for such application.[8]

Congress must determine whether Title III applies to foreign cruise ships at all, and if so, to every ship embarking, disembarking or entering the U.S., only those that do so with regularity, based upon the percentage of U.S. passengers carried, or according to other criteria. Most of the world's cruise ships reposition among multiple jurisdictions throughout each year, both in the U.S. and abroad. A typical ship might spend the winter months cruising the Caribbean on voyages originating in Florida or Texas, embark passengers throughout the spring in Italy or Spain for Mediterranean cruises, and transfer to Canada for summer cruises embarking in Vancouver and stopping at ports in Alaska. Longstanding

[8] In its June 29, 1999 letter to U.S. Congresswoman Marge Roukema, the DOJ recognized:

> Title III of the ADA does not contain any express provisions extending the law to extraterritorial activities. Moreover, although Title III of the ADA applies to public accommodations and commercial facilities whose operations 'affect commerce' and the statute defines commerce, in part, as 'travel, trade, traffic, commerce, transportation or communication . . . between any foreign country or any territory or possession and any State,' such broad language, found in many laws, is not generally considered sufficient, by itself, to overcome the presumption against extraterritoriality. . . Furthermore, Congress, in passing the Civil Rights Act of 1991, amended sections 101(4) and 102 of the ADA, to broaden the ADA to protect extraterritorial employment. . . No comparable, explicit expression has been made with respect to extraterritorial coverage of public accommodations and commercial facilities under title III.

(Internal citations omitted), *available at* <http://www.usdoj.gov/crt/foia/tal792.htm>.

U.S. cabotage laws prohibit foreign vessels from engaging in coastwise trade, thus mandating travel to foreign ports. *See* Passenger Services Act, 46 U.S.C. § 289, and Jones Act, 46 U.S.C. § 883. Were every foreign nation to apply its own accessibility standards to international cruise ships embarking passengers in its territorial waters, as was done in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), *reh'g denied, reh'g en banc denied* 284 F.3d 1187 (11th Cir. 2002), it would result in a clear operational dilemma.[9]

Before imposing vague and undelineated ADA requirements on foreign cruise ships, Congress must also consider the existing international maritime regime. Among the most important of these laws are the IMO recommendations for vessel design and operation with regard to accessibility,[10] the technical, structural, safety and operational mandates of SOLAS,[11] and the International

[9] For illustration purposes, ICCL member cruise lines will embark passengers in all of the following foreign nations within the next year: Africa, Argentina, Aruba, Australia, Bahamas, Barbados, Brazil, Canada, Chile, China, Costa Rica, Denmark, Ecuador, Egypt, England, France, Greece, Iceland, India, Italy, Japan, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Russia, Seychelles, South Africa, Spain, Sweden, Tahiti, Thailand, Turkey, United Arab Emirates, and Vietnam.

[10] The IMO is a United Nations agency that reviews current maritime issues and sets international law by adopting conventions and treaties among its 164 member nations, including the United States. The IMO and its member states comprise 98% of the world's shipping tonnage and is responsible for establishing global standards for cruise ship safety, design and construction. The IMO Maritime Safety Commission ("MSC") published its "Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs" on June 24, 1996. *See* IMO's MSC Circular 735.

[11] International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, *reprinted in* SOLAS: CONSOLIDATED EDITION 2001 (Int'l Mar. Org. ed., 2001).

Convention on Load Lines governing watertight integrity aboard oceangoing vessels.[12]

A. Foreign Cruise Ships Are Built and Operate Under a Pervasive System of International Laws

All foreign ships are built in foreign shipyards pursuant to worldwide shipbuilding standards, in compliance with several international treaties. The ships are inspected and certified by international bodies before commencing operation. Buildings in the U.S. are constructed according to domestic engineering standards that take into account longstanding ADAAG regulations for accessibility. U.S. building codes, including ASME, ANSI and BHMA,[13] were developed so entities covered by the ADA could comply with existing standards. These land based U.S. standards neither apply to cruise ships built abroad nor are readily transferable to a marine environment.[14] No vessel built in a U.S. shipyard

[12] Among the requirements of the Convention on Load Lines, also ratified by the United States, is the installation of watertight doors in specified compartments, necessitating raised sills and thresholds (International Convention on Load Lines, Apr. 5, 1966, Ch. II, Regulation 12, 18 U.S.T. 1857), which plaintiffs' counsel have argued violates the ADA.

[13] American Society of Mechanical Engineers (ASME); American National Standards Institute (ANSI); Builders Hardware Manufacturers Association (BHMA).

[14] The Passenger Vessel Access Advisory Committee ("PVAAC"), created by the U.S. Access Board to formulate recommendations for accessibility on large passenger ships, issued its final report in December 2000. Its recommendations were based on U.S. engineering standards and urged that the "competent regulatory drafting authorities . . . specifically review all referenced industry standards to determine their suitability in designing equipment for use onboard ships in the marine environment" and that final regulations recognize international standards used in foreign shipyards. *See* Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000, *available at*

for international commerce would be constructed according to land based building codes of another nation.

Comprehensive treaties already govern ship design, construction and operation. Perhaps the most important, SOLAS, deals with safety at sea.[15] International treaties are instrumental in establishing consistent standards for all nations participating in maritime commerce, including the United States. Uniform application avoids conflicts among varying national standards that could frustrate commerce and heighten tensions in foreign relations.

Other important maritime compliance safeguards, used by all flag nations including the United States, are certificates issued by classification societies.[16] Uniformity among these societies is maintained by the International Association of Classification Societies, whose members are bound not only by a code of ethics but also a quality systems certification scheme. The U.S. Coast Guard depends upon the classification societies to ensure compliance with international standards for design, operation and construction of ships entering U.S. waters.

<http://www.access-board.gov/pvaac/commrept/index.htm>., Ch. 1, notes.

[15] SOLAS was adopted in 1914 in response to the Titanic disaster and has since been amended and adopted by signatory nations, including the United States, four additional times. The 1960 SOLAS amendment was the first major task tackled by the IMO. Over 40 conventions and protocols have been drafted and adopted by IMO members along with 800 codes and sets of recommendations that complement the treaties.

[16] Classification Societies are privately owned, operate separately from any nation's control and are generally non-profit organizations. They date back more than 200 years and determine the international regulations applicable to the construction and operation of commercial maritime vessels, including cruise ships, and certify, through periodic inspections, each vessel's design and construction. The United States, like other flag nations, inspects vessels for class certifications, and routinely relies upon the largest classification societies to certify U.S. and foreign flag vessels, including Lloyd's Register of Shipping, Nippon, Kaiji Kyokei, American Bureau of Shipping, Det Norske Veritas of Norway, and Bureau Veritas of France.

Congress must evaluate the impact of U.S. accessibility standards on this complex system of laws governing foreign ships. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U. S. 138, 147 (1957). Further, a number of other nations have proposed or enacted their own laws establishing accessibility standards for transporting passengers with disabilities on vessels flagged in their countries.[17] The blanket imposition of domestic standards on international carriers destroys the concept of uniformity and defeats the goal of national administrations to develop consistent standards.[18] The legislature must first consider the implication of exercising

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[17] *See* United Kingdom's Disabled Persons Transport Advisory Committee's Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People ("DPTAC"), modeled after IMO's guidelines of MSC Circular 735, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>; Canada's Code of Practice, Ferry Accessibility for Persons with Disabilities, *available at* <http://www.cta-otc.gc.ca/access/codes/ferry/index_e.html>; Australia's Disability Standards for Accessible Public Transport, *available at:* <http://law.gov.au/www/civiljusticehome.nsf/AllDocs/RWP2D7CECE1EA698DC4CA256C1D00001E0B? OpenDocument>. *See also* the Disability Rights Education and Defense Fund A to Z list of all nations with laws protecting individuals with disabilities, *available at* <http://www.dredf.org/international/lawindex.html>.

[18] The international goal of achieving uniformity in maritime commerce was long ago recognized with the creation of the IMO, the purpose of which was in part "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation," and "to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination." Convention Establishing the Inter-Governmental Maritime Consultative Organization, (March 6, 1948) (renamed Convention on the International Maritime Organization in 1982), Part I, Article 1(a) and (b), 9 U.S.T. 621.

national power on the maritime community. To presume U.S. laws should apply to all foreign ships entering U.S. waters, or that all foreign registries are shams, as urged by Petitioners and their *amici*, creates a dangerous precedent based on an erroneous premise. Such a view encourages other nations to unilaterally apply their laws to American interests abroad.

B. The Lack of Any Cruise Ship-Specific Regulations, Caused by the Complexity of Reconciling Conflicting Laws, Underscores the Need for Legislative Clarification

The DOT and DOJ were directed by Congress to enact ADA regulations for all covered entities, but have acknowledged cruise ships require special consideration and are exempt from shore side regulations.[19] Meanwhile, no regulations have been adopted addressing vessels, nor any of their appurtenances or features. These include, for example, the number of accessible cabins, routes of ingress or egress (i.e., gangways), accessibility standards for life boats, tenders, passageways, raised door thresholds or shipboard lifts, or any of the numerous other shipboard structures. The DOJ in its own ADA Title III Technical Assistance Manual, states: "Because of the unique structure of ships, none of the

[19] In 1991, the DOT observed that "at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels. . . [The DOT] anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels." 56 Fed. Reg. 45,584, 45,599 (Sept. 6, 1991). The DOT also noted that before promulgating specific requirements for foreign ships it would need to determine whether any treaty provisions, such as SOLAS, might conflict with the ADA and its regulations. *Id.* At 45,600. Likewise, the DOJ declared it "will not interpret the new construction and alterations provisions of Subpart D" to apply to cruise ships "pending further development of specific requirements." 28 C.F.R. PT. 36, App. B at 664.

ADAAG technical or scoping standards are appropriate. Until such time as the [Access Board] issues specific standards applicable to ships, there is no requirement that ships be constructed accessibly."[20]

Notwithstanding the absence of any statutes or regulations tied to foreign cruise ships, numerous lawsuits have been filed against ICCL members seeking injunctions under the ADA to cease operations pending physical reconstruction of their ships.[21] These actions have demanded compliance with ADAAG, applicable solely to land based

[20] ADA TECHNICAL ASSISTANCE MANUAL, U.S. DEP'T OF JUSTICE, § III-5.3000, illus. 3 (1993). Even if the DOT and DOJ promulgate regulations for cruise ships, their applicability to foreign vessels would remain unclear unless Congress amends Title III.

[21] Reported cases include: *Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999) [rejecting claims under ADA's construction and alteration provisions when no regulations exist]; *Resnick v. Magical Cruise Co. Ltd.*, 148 F. Supp. 2d 1298 (M.D. Fla. 2001) [no relief available under ADA's construction and barrier removal provisions in the absence of cruise line regulations]; *Access Now, Inc. V. Holland Am. Line-Westours, Inc.*, and *Costa Crociere, S.P.A.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001) [denying motions to dismiss and permitting cases to proceed despite absence of applicable cruise line regulations]; *Assoc. for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) [applying Title III's barrier removal provisions to casino cruise ship]; *Disabled Americans for Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 329 F. Supp. 2d 209 (D.P.R. July 14, 2004). *See also Spector v. Norwegian Cruise Line Ltd.*, No. H-00-2649 (S.D. Tex. Sept. 10, 2002) [enforcement of Title III's barrier removal provisions barred absent regulatory guidelines], *affirmed on other grounds, Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 650 (5th Cir. 2004), and complaints filed in the following actions: *Access Now, Inc. v. Cunard Line Ltd.*, No. 00-7233 (S.D. Fla. 2000); *Access Now, Inc. v. Royal Caribbean Cruises, Ltd.*, No. 00-2255 (S.D. Fla. 2000); *Access Now, Inc. v. Celebrity Cruises, Inc.*, No. 00-2254 (S.D. Fla. 2000); *Access Now, Inc. v. Carnival Corp.*, No. 98-3081 (S.D. Fla. 1998); *Ernst-Rosenkrantz v. Carnival Corp.*, No. 99-0267 (S.D. Fla. 1999); *Giacopini v. Crystal Cruises, Inc.*, No. C-04-1089 (N.D. Cal. 2004); *Walker v. Carnival Cruise Lines*, No. C-98-2926 (N.D. Cal. 1998); *Zetwick v. Carnival Corporation*, No. C-02-0740 (N.D. Cal. 2002).

facilities.[22] The DOJ has intervened in many of these suits, advancing the view Title III applies. Paradoxically, DOJ simultaneously concedes ADAAG cannot be applied. Even the PVAAC, established by the U.S. Access Board to study passenger vessel access, has agreed special regulations are essential. Throughout its deliberations and in its Final Report, the PVAAC identified numerous instances of direct conflict between ADAAG on the one hand, and SOLAS and U.S. Coast Guard requirements on the other.[23]

The ADAAG regulations provide twenty-one recommended examples of steps to remove barriers in land based buildings. However, very different considerations are involved at sea. For example, placement of grab bars and handrails can be affected by the movement of a vessel on the high seas. Installing offset hinges to widen doorways conflicts with SOLAS requirements for specific hardware to

[22] Upon publishing the Draft Guidelines for Passenger Vessels, the Access Board noted with regard to ADAAG "The standards currently used to enforce ADA's transportation provisions cover access to buses, vans, rail cars and other vehicle types but do not address passenger vessels." *Available at* <http://www.access-board.gov/news/pvag.htm>.

[23] The PVAAC identified approximately 90 Code of Federal Regulations sections for ship safety that conflict with ADAAG and need to be reconciled so that shipowners do not violate Coast Guard regulations when complying with accessibility requirements. *See* Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000, *available at* <http://www.access-board.gov/pvaac/commrept/index.htm>, Ch. 13 and ADAAG/Coast Guard Comparison Index. The PVAAC also identified conflicts with 11 SOLAS provisions including those concerning watertight integrity and the required "coamings of ample heights," means of escape, signage, alarm systems and public address systems. *Id.*. The PVAAC recommended that the appropriate regulatory bodies reconcile the SOLAS conflict relating to audible alarms. *Id.* Ch. 4 § 702.2 Advisory Note. The PVAAC recognized that the necessary economic and physical data required to further develop gangway standards were not readily available, and that such standards will be impacted by high and low water situations at a given location. *Id.* at Ch. 2, § 1005 (Gangways), Advisory note.

ensure doors are watertight and fire safe in a marine emergency.[24] Accessible hardware, required in buildings under the ADA, conflicts with SOLAS' requirement that doors operate electronically from a central location, as well as manually, to prevent internal flooding and the spread of fire. *Id.*

The impossibility of applying the ADAAG regulations onboard ships is not surprising. At the most basic level, buildings do not move, while ships are constantly affected by six degrees of motion – pitch, roll, heave, surge, sway and yaw. Ships are complex and carefully designed to integrate fire safe zones, watertight and automatic fire doors, muster stations, lifeboats, stabilizers, extensive fire fighting and other safety systems, all of which require design elements different from those applicable to land based facilities. The deck capacity, weight restrictions, steel tensile strength, stability considerations, bulkheads, walls, ceilings, fittings and hardware are all unique on ships because they must float; withstand flooding, listing, or movement in seaways; combat fires in the middle of the ocean; connect with piers around the world; navigate through canals; sail through shallow or deep waters; and move at sea without injuring passengers.

Buildings are constructed of easily moveable drywall facilitating physical alteration. Patrons can be readily evacuated to adjacent structures, surrounding property, hospitals and shelters. By contrast, ship bulkheads are constructed of solid steel to ensure watertight and fire safe integrity. Vessels and their lifeboats must function as places of safe refuge while at sea. The design and function of modern international passenger ships demand extensive coordination among experts in marine architecture, engineering, operation, safety and disability accommodations, to determine what accessibility standards can be achieved on the oceans. This effort *must* ensure any regulations do not

[24] *See* SOLAS, *supra* fn. 11, Ch. II-1, Regulation 15.

conflict with shipbuilding standards, international conventions, and classification society requirements adopted by flag states.

II. REQUIRED UNIFORMITY UNDER THE ADA AND IN MARITIME MATTERS IS LOST UNLESS CONGRESS DEFINES THE REACH OF TITLE III, AND THE REGULATORY PROCESS, ONCE AUTHORIZED, IS COMPLETED

Courts are not equipped to fashion injunctive relief in Title III actions brought against foreign cruise ships because neither Congress nor the federal agencies have addressed the issue. Cruise operators cannot determine what constitutes legal compliance. An injunction issued by one court has no preclusive effect upon another plaintiff suing the same cruise line in a different jurisdiction, even with respect to the same ship. These dilemmas undermine the required uniformity embodied in the ADA[25] and fundamental to maritime law. The need for a statutory scheme and regulations is critical for cruise ships traveling to multiple jurisdictions, repositioning seasonally to various parts of the world, and carrying citizens from many nations.

The legal morass concerning Title III has scuttled any notion of uniformity in the cruise industry. Congress's goal of uniform accessibility standards, along with the venerable doctrine of maritime uniformity expressed in the Constitution as an integral part of American law[26], are intended to avoid

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[25] Congress expressed its desire for a consistent nationwide application of the ADA, the purpose of which was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). To effectuate its intent, Congress required the DOT and DOJ to enact accessibility regulations that would create uniform standards for covered entities.

[26] *See* U.S. CONST. art. III, § 2. The importance of national and international uniformity in maritime law is well-established in the

such quagmires. Yet plaintiffs prosecuting ADA lawsuits against cruise operators, including Petitioners, have asked the lower courts to decide how foreign ships should be rebuilt, altered or operated to accommodate special needs. The results have varied in each jurisdiction. Judges must rely solely upon the opinions of paid experts to determine how claims by passengers with disabilities should be reconciled with the unique requirements of oceangoing ships. Cruise lines complying with court orders may be required to undo structural changes upon the enactment of final regulations, assuming the responsible agencies are so authorized.[27]

Foreign ships sailing to or from U.S. ports routinely reposition from one part of the country or world to another with each season. A typical cruise ship could sail from New York, Florida, Texas, California, Washington, Alaska, and Hawaii in one year. Injunctive actions against cruise lines have already been initiated in most of these states.[28] The

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decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221, 1986 AMC 2113, 2124 (1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601, 1973 AMC 2573, 2593-94 (1974) (Powell, J., dissenting); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

[27] Petitioners' reliance on litigation settlements by some cruise lines is neither relevant nor helpful to this Court's analysis. These settlements, reached in the absence of any standards, underscore the need for a congressional framework and comprehensive scheme for applying Title III. As a matter of public policy, the level of accessibility on cruise ships should not depend on the negotiating prowess of private litigants. Such *ad hoc* adjudication, through varying court orders and private settlements, not only fosters confusion, but leads to conflicting results and forum shopping in an industry most in need of national and international uniformity. Moreover, the government has not approved the settlements, and the settling lines are not immunized from subsequent regulatory enforcement of different standards, or compliance with later-developed regulations.

[28] Congressional action and uniform regulations are *essential prerequisites* for application of Title III's accessibility provisions to foreign cruise ships, as exemplified by injunctive suits simultaneously brought against the world's largest cruise line, Carnival Cruise Lines, in California and Florida. Courts in both jurisdictions were asked to issue

following year the same vessel might be based in Europe and never touch a U.S. port. The legal whirlpool created by individual lawsuits is not only unworkable, but also results in great difficulty ascertaining any discernable level of accessibility in the cruise industry. Assuming Congress clarifies the circumstances under which Title III applies to foreign ships, cruise lines can participate in the rule making process and voluntarily comply with meaningful regulations.

A. Bypassing Congressional and Regulatory Clarification of Title III's Application to Foreign Ships Creates Chaos in the Cruise Industry

The complaints brought against cruise lines under Title III typically contain only vague allegations that operators have violated the Act by failing to provide "appropriate" access.[29]

injunctions regarding accessibility and vessel operations and to determine, in lieu of the responsible federal agencies and in the absence of any statutory framework, what modifications should be made to the line's foreign ships. Both prosecuting law firms sought awards of attorney's fees and each retained different "access experts" to render opinions on what modifications were "proper." *See* Complaint, *Walker v. Carnival Cruise Lines* (N.D. Cal. 1998) (No 98-2926); Complaint, *Access Now, Inc. v. Carnival Corp.* (S.D. Fla. 1998) (No. 98-3081). Ironically, these are among the cases that have been settled and which, according to Petitioners, demonstrate why Title III can be applied with ease.

[29] *See, e.g.*, Complaint, *Access Now, Inc. v. Costa Crociere S.P.A.* (S.D. Fla. 2000) (No. 00-7231) [seeking injunction for "appropriate" slopes, handrails, landing areas, signage, routes, or telecommunication devices; to reposition telephones to "appropriate" levels; to provide elevators with "appropriate" visual and auditory indicators and call buttons at "appropriate" heights; to widen doors and doorways (to unspecified widths); to provide "proper" door hardware or "appropriate" opening resistance and/or closing delay, with "appropriate" and "proper" access throughout the rooms, bathrooms, and around furniture; to provide "appropriate" life safety devices, or provide the "requisite" electrical outlets and shelf space, "requisite" signage throughout the ship for all

Congress has not specified whether, when or to what extent Title III governs foreign ships. No regulations specify the number of accessible cabins required on any vessel, or the "proper" width of doorways, "appropriate" height and type of handrails, switches, service counters, or other facilities. Cruise operators have no guidance on how to reconcile requested changes with foreign and international standards.

SOLAS governs the placement of bulkheads, main vertical zones and stairtowers; water tight doors with raised thresholds and automatic fire doors; and affects the extent to which ships can be made as accessible as buildings, buses or trains in the United States.[30] Signage requirements applicable to land based buildings conflict with those for cruise ships under SOLAS, directing the flow of passengers to lifeboats and muster stations in an emergency.[31] SOLAS dictates unobstructed emergency egress and doors, mandatory participation in fire drills and musters, and proper design and use of life rafts, boats and tenders.[32] All of these laws, to which foreign cruise ships *must* adhere, place necessary

accessible routes; and the "requisite" number of guest rooms in all price categories for disabled individuals]. *See also*, Complaint, *Access Now, Inc. v. Cunard Line Ltd.*, (S.D. Fla. 2000) (No. 00-7233); Complaint, *Access Now, Inc. v. Royal Caribbean Cruises, Ltd.* (S.D. Fla. 2000)(No. 00-2255); Complaint, *Resnick v. Walt Disney Co.* (M.D. Fla. 2000) (No. 00-898); Complaint, *Access Now, Inc. v. Holland America Line-Westours, Inc.* (S.D. Fla. 2000) (No. 00-7230); Complaint, *Access Now, Inc. v. Celebrity Cruises, Inc.* (S.D. Fla. 2000) (No 00-2254); Complaint, *Ernst-Rosenkrantz v. Carnival Corp.* (S.D. Fla. 1999) (No 99-0267); Complaint, *Access Now, Inc. v. Carnival Corp.* (S.D. Fla. 1998)(N0 98-3081).

[30] SOLAS requires that vessels be equipped with watertight bulkhead doors which can be closed remotely. SOLAS, *supra* fn 11, Ch. II-1, Regulation 15. The Convention also requires that such doors be equipped with manual opening devices and hardware. *Id.* Recent lawsuits against cruise lines claim the lines have violated the ADA by complying with these requirements.

[31] *See* SOLAS, *supra* fn. 11, Ch. II-2, Regulation 28.

[32] *See* SOLAS, *supra* fn. 11, Ch. II-2 Regulation 28-1, Ch. III, Regulations 8, 11, 19, 21, 23, 25, 30.

limitations on shipboard accessibility for disabled patrons.

Countless questions are therefore unanswered. Are accessibility modifications required for muster stations, lifeboats, all or only some public restrooms, decks, or cabin categories? Are ramps required at all doorways, cabin doorways, restroom doorways, emergency doorways, or only in cabins designated as "wheelchair accessible?" How do space constraints in life boats and the traditional safety duties of the crew in maritime emergencies affect the number of wheelchair passengers who may be carried on board? Should the lack of rapid availability of shore-based resources limit the number of accommodations for guests with special needs as compared to hotels, busses or trains? Where should accessible cabins be located in relation to exits (which change from port-to-port depending upon tides and local facilities), and where should patrons with communication impairments be situated? What is the effect of tidal changes in ports around the globe on gangway accessibility? Under what circumstances can tenders be modified and used by passengers with various disabilities?

Undoubtedly, many such questions led the Access Board, DOT, and DOJ to defer application of the structural aspects of the ADA to cruise ships. Under these circumstances, and because Congress has yet to address the reach of Title III at sea, application of a case-by-case "readily achievable" standard destroys maritime uniformity and is untenable and unfair. In case of a shipboard emergency at sea, it could jeopardize lives.

B. The Access Board's Recent Publication of Draft Guidelines Does Not Obviate the Need for a Congressional Framework

Plaintiffs in ADA lawsuits have asserted landside ADAAG regulations provide adequate guidance to foreign cruise ships for necessary barrier removal. Others have argued the PVAAC Final Report supplies the requisite standards. Petitioners now contend the Access Board's draft guidelines published on November 26, 2004 should be applied. The very fact that Petitioners and their *amici* assert differing "guidelines" should be followed underscores the conundrum cruise lines face with respect to Title III.

The PVAAC Final Report recommendations are not *regulations*. Indeed, they have been changed in various respects by the Access Board in the "draft guidelines." The DOJ has indicated draft guidelines are of no legal consequence.[33] Ordering foreign ships to be modified at this juncture, based on draft guidelines alone, in the absence of any congressional authorization, improperly subjects cruise operators to a multiplicity of lawsuits, regulatory action and modifications.

Despite consultation with an advisory committee and over six years of review, the efforts of the Access Board and responsible agencies have resulted in only partial draft recommendations. These draft guidelines raise numerous engineering issues caused by peculiar vessel design. A multitude of unanswered questions are posed to cruise

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[33] The DOJ stated when publishing the Advance Notice of Proposed Rulemaking for Revised ADAAG: "The ADA requires the Department to publish regulations that include accessibility standards that are consistent with the Access Board's guidelines. Until the Department's rulemaking is complete, the revised ADA Guidelines are effective only as guidance to the Department (and to the Department of Transportation). *The revised guidelines have no legal effect on the public.*" (Emphasis added). *Available at* <http://www.ada.gov/proposal.htm>.

operators.[34] The Board, in its "Draft Plan for Regulatory Assessment," is now seeking comments from designers, shipyards and vessel operators regarding the impact of scoping and technical provisions on newly constructed ships.[35] The Board has identified 36 instances in which the draft guidelines require additional space or new features on a vessel, or raise other design challenges.[36] The complexity of issues, remaining procedural steps before final regulations can be promulgated, and the pending question of congressional intent concerning foreign ships, preclude reliance on draft guidelines to support Petitioners' claims.[37]

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[34] The Notice of Availability of Draft Guidelines ("NADG") presents more than 100 questions of scoping, general application and qualification. The draft guidelines indicate the Access Board, DOJ and DOT are not prepared to implement regulations for passenger vessels without a great deal of research and a comprehensive cost benefit analysis. Among the questions posed by the Access Board are: "What should be considered a new vessel, triggering the requirement that the vessel be built to fully comply with the Access Board's guidelines?" "Is it feasible to require that these vessels provide an accessible means of embarking and disembarking passengers with disabilities at all foreign ports of call despite the allocation of responsibility for providing such services in the U.S.? What additional consideration should be made in addressing foreign ports of call?" "Are there reasons to treat accessibility requirements for on-board amenities any differently on vessels than elsewhere?" "Should 'readily achievable' barrier removal concepts apply 'unaltered' to passenger vessels?" (*See* 69 Fed. Reg. 69,247-69,2450 (Nov. 26, 2004)). Clearly the Access Board is concerned about extraterritorial application, has not "worked through the issues" and has not issued draft guidelines that "are fully consistent with SOLAS" as advanced in Amicus Brief of the Solicitor General of the United States, p 28.

[35] *Available at* <http://www.access-board.gov/pvaac/assess-plan.htm>.

[36] *Id.*

[37] Not until four years after the PVAAC issued its Final Report did the Access Board issue its NADG, on November 26, 2004, immediately after this Court granted review. As required by the APA (5 U.S.C. § 553), the next step in the process is a period during which the public, including cruise lines and other interested parties, may comment on the draft. Subsequently, there will still be the ANPRM (Advanced Notice of Proposed Rule Making) and NPRM (Notice of Proposed Rule Making), each to be followed by the required comment period and hearings. Then the OMB (Office of Management and Budget) will be required to perform a cost-benefit analysis. After this extensive process, final guidelines will be published. The DOT and DOJ will later issue regulations based on the guidelines, and after a period for voluntary compliance, final regulations become binding. The process of promulgating regulations applicable to cruise ships is still in its infancy. The question of extraterritorial application is unresolved, so the applicability of Title III remains entirely unclear.

The Access Board's latest inquiries also illustrate the draft guidelines have not eliminated conflicts with SOLAS, as asserted by Petitioners and their *amici*.[38] Neither Petitioners nor their supporting *amici* mention existing conflicts between the draft guidelines and *other* international and foreign standards. For instance, IMO guidelines, adopted by individual nations, sensibly require accessible cabins to be located "in the proximity of" the embarkation deck to ease life boat use and emergency evacuation.[39] Conversely, the Access Board's draft guidelines call for dispersion of accessible cabins throughout all levels of a ship.[40] The United Kingdom, hardly a "flag of convenience," has adopted the IMO standard. Actual conflicts therefore exist between British law and the U.S. draft guidelines.[41] The famous QE2, for

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[38] *See* Brief of Petitioners 45-46. Rather than providing a solution to one of the most basic accessibility issues – boarding and disembarking ships, affected by weather, tides, terminal facilities, gangways and mechanical devices, the Access Board has advised vessel and pier operators to "negotiate an allocation of responsibility for compliance." *See* Draft Guidelines, "Discussion of Provisions" § V208, *available at* http://www.access-board.gov/pvaac/guidelines.htm.

[39] MSC Circular 735, *supra* fn. 10, at § 4.1.

[40] Draft Guidelines § V224.2, *available at* <http://www.access-board.gov/pvaac/guidelines.htm>.

[41] The British DPTAC guidelines, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>.(*See* fn. 17, *supra*) require unisex wheelchair-accessible bathrooms, (DPTAC § 2.28), whereas U.S. draft guidelines require wheelchair accessible facilities in both the men's and women's restrooms in newly constructed vessels

example, duly registered in the U.K., constructed to meet U.K. standards and only rarely calling in U.S. ports, cannot determine how to follow both structural approaches. According to the *Stevens* criteria, this ship which in 2005 will spend less than 48 hours in U.S. ports, would have to be retrofitted to meet U.S. law, only to have these physical changes dismantled after leaving U.S. waters.

Congress expressly provided in Title I that foreign law would control in the event of conflicts with the ADA. *See* 42 U.S.C. § 12112 (c)(1).[42] Title III is silent on this point. No provision reconciles barrier removal with other laws. The government nonetheless opines, without statutory support, that any barrier removal in conflict with an *international treaty* would not be deemed "readily achievable." (*See,* Amicus Brief of the Solicitor General of the United States, p. 27.) Neither Title III nor the draft guidelines state or imply that barrier removal is not readily achievable if inconsistent with international law.[43] As one court observed, "Such a brief [of the government] in such circumstances cannot claim much

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(V213.2); the U.K. requires elevator doors to have clear opening of at least 900mm (DPTAC § 5.7), whereas the U.S. requires a minimum of 915mm (V407.4.1); U.K. requires minimum bathroom doors of 900mm with a maximum opening force of 15 newtons (DPTAC § 2.29), whereas the U.S. requires a minimum of 815mm and maximum force of 22.2 (V404.2.3, V404.2.9); U.K. requires a maximum of 1:12 ramp slope (DPTAC § 5.19), whereas the U.S. allows a slope of 1:8 (V405.2) (thus compliance with U.S. standards as to bathroom door size, opening force and ramp slope would actually violate U.K. standards).

[42] Section 12112 (c) (1) provides "It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination…if compliance with this section would cause such covered entity to violate the law of the foreign country in which the workplace is located." Title III contains no comparable provision.

[43] The "readily achievable" criteria of Title III include only: the cost of the remedial action, financial resources of the facility and covered entity, and type of operation, including composition and functions of the workforce and relationship of the facility and covered entity. 42 U.S.C. § 12181 (9) (A) through (D).

democratic legitimacy to set over against the intent of Congress so far as it can be gleaned from the usual interpretive sources – which do not include the brief of one of the parties!" *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 563 (7th Cir. 1999). Congress, not the Solicitor General, must state how a Title III covered entity and the courts should deal with conflicts between applicable laws.

The Solicitor General's opinion that Title III barrier removal in conflict with international conventions would not be "readily achievable" fails to address conflicts with *foreign law*. Conceding the existence of conflicts between U.S. accessibility standards and those promulgated abroad, the government overlooks the existence of conflicts with standards imposed by other flag states, port states, or nations where ships are constructed or classed. That the U.S. contends its accessibility standards should apply to ships entering U.S. ports acknowledges the potential for the application of other nations' standards to the same ships. Cruise operators with global operations must have reliable guidance, apart from the government's amicus brief, to enable them to determine which laws govern. A clear mechanism for conflict resolution, addressing applicable foreign *and* international law, must be established, particularly in an international industry in which uniformity is paramount and passenger safety of overriding concern.

The government's "argument" that barrier removal would not likely be required if in conflict with international (but not foreign) law overlooks a more basic problem – the lack of *any* regulations for barrier removal on *any* ships. To properly determine whether a requested barrier removal is "readily achievable," a court, like a cruise line, must be able to identify the applicable legal standards. No guidance exists for addressing barrier removal on cruise ships. No court can properly reach, let alone answer, the question of whether any requested modification is "readily achievable."

III. COURTS CANNOT APPLY THE ACCESSIBILITY PROVISIONS OF TITLE III TO FOREIGN CRUISE SHIPS UNLESS CONGRESS FIRST AMENDS THE ADA

Petitioners and their *amici* urge this Court to extend the accessibility provisions of Title III to foreign cruise ships under the "readily achievable" standard in the absence of *any* statutory directive *or* applicable regulations. They ignore the legislature's mandate to delay the effective date of the Act until rule making was complete.[44] They maintain that court imposed, after-the-fact decisions on accessibility constitute an appropriate application of the Act.

Permitting Title III suits under these circumstances raises serious administrative and constitutional law concerns. Should this Court accept Respondent's arguments, it need not reach these concerns. However, should this Court accept Petitioners' arguments, several significant corollary issues will necessarily remain in this action on remand and will be present in any other action involving a Title III claim against

[44] The unambiguous language of Title III proves Congress intended that accessibility regulations be created, with notice to covered entities and opportunity for compliance, before liability for barrier removal would be triggered. Congress delayed the effective date of the ADA until eighteen months after it was passed, (42 U.S.C. § 12181) and directed that the regulatory agencies "shall" adopt specific standards for covered entities to give the Act meaning (42 U.S.C. § 12186). The DOT and DOJ were to issue regulations to carry out the provisions of Title III within one year of enactment. (42 U.S.C. § 12186). Thus, covered entities had six months after regulations were adopted to comply with the standards established. Had Congress intended barrier removal to be accomplished without any regulatory direction, it could have required immediate compliance and included that section in those having immediate effect. The DOJ has further announced the "requirement for barrier removal . . . shall not be interpreted to exceed the standards for alteration in Subpart D of this Part." The Justice Department thus believes Congress intended barrier removal to be limited by the scope of existing regulations.

a cruise line. Chief among these is the practical difficulty cruise lines and courts will face in understanding how to apply Title III in the absence of any congressionally required regulatory direction. In that instance, this Court should provide appropriate guidance to lower courts adjudicating Title III claims against cruise lines.

ICCL asks the Court to clarify that no Title III claim involving a foreign cruise ship can become viable until Congress amends Title III *and* the appropriate regulatory agencies discharge their statutory responsibility to promulgate regulations, providing cruise lines the opportunity for voluntarily compliance. Otherwise, the result is that two classes of covered entities would be created under the Act. The first would encompass those U.S. facilities on land, for which Congress expressly extended Title III and specific standards were created to allow compliance. The second would consist solely of foreign cruise ships, subject to a case-by case choice of law analysis and "readily achievable" criteria with no specific standards. Only owners of facilities on land would receive advance notice of what must be done to avoid being sued. Petitioners and their *amici* apparently believe neither Congress nor the regulatory authorities should provide operators of foreign cruise ships equal consideration.[45]

Clear legislative direction, with specific regulations, is required to extend extraterritorial application of Title III to foreign ships. Presently, as conceded by Petitioners, operators

[45] Ignoring the statutory scheme, the Solicitor General contends cruise operators must remove barriers in the absence of *any* standards. On the one hand the government concedes a ship need not be constructed accessibly (see discussion at footnotes 19, and 44, *supra*), but on the other hand argues operators should be liable for failing to guess what barriers must be removed before the ship is launched. Requiring shipowners to reconstruct vessels to meet unspecified levels of accessibility, when not requiring the same shipowners to construct or renovate ships according to any standard, epitomizes circular logic.

of foreign cruise ships are left with only two words to assess whether their conduct violates the law: "readily achievable." The lack of any discernable standards or regulatory guidance, from the very agencies now contending application of Title III to foreign ships is essential, highlights the weakness of Petitioners' contentions. The only "standard" is whether an individual judge or regulator will deem a requested modification "accomplishable without much difficulty or expense." 42 U.S.C. § 12181 (9). To guess accurately, a cruise operator must speculate how to factor in such parameters as the cost of the modification, the resources of the facility and operator, and the relationship of the facility to the operator. *Id.*, § 9 (A) – (D). The cruise operator is left to speculate over conflicts between the undefined standard of accessibility, foreign and international laws, and concerns for passenger safety. If the operator's analysis later conflicts with a judge's *post facto* determination, liability attaches merely because the operator guessed wrong. No other entity covered by the ADA, let alone an entire industry, is placed in such a precariously vague predicament.[46]

The extension of the ADA to foreign ships advanced by Petitioners delegates basic policy matters to judges and juries

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[46] This Court aptly observed in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . .

for resolution, after the fact, on an *ad hoc* and subjective basis. The attendant dangers of arbitrary and discriminatory application become apparent. Certainly, foreign cruise ships are entitled to a more deliberative, public and systematic procedure than the *ad hoc, post facto* determinations urged by Petitioners.[47]

Title III is silent on its application to foreign cruise ships. The agencies directed to promulgate regulations have not done so. Congress stayed enforcement of Title III's barrier removal provision until after regulations were enacted. Under these circumstances, the only statutory interpretation consistent with congressional intent, and which avoids subjecting foreign cruise ships to a different standard than land-based facilities, is that Title III does not yet apply to foreign cruise ships.

The lower courts should not interfere in the legally required legislative and regulatory process by holding cruise operators liable for failing to comply with the PVAAC Report, draft guidelines, inapplicable ADAAG standards, or a vague notion of what is otherwise "readily achievable." Rather, this Court should defer to Congress to specify the extent of the ADA's reach. Assuming an amendment is duly enacted, then the DOT and DOJ should complete the rule making process of and create final cruise ship regulations.

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[47] In *Doe v. Mutual of Omaha Insurance Co., supra*, plaintiff alleged defendant violated the ADA by capping insurance benefits for AIDS patients. The DOJ's *Technical Assistance Manual* expressly prohibited discrimination by insurers in the conditions contained in insurance contracts, and the DOJ filed an *amicus* brief arguing defendant's conduct violated the ADA. However, as in the present situation, the DOJ had not promulgated regulations governing coverage limits at issue in *Doe*. The court rejected the ADA claim, holding: "Displacing the regulation of the insurance industry into the federal courts is a sufficiently far-reaching interpretive stride to justify us in requiring the Department to invite deference by a more deliberative, public, and systematic procedure than the filing of an amicus curiae brief." *Id.* at 563.

IV. CONCLUSION

For all the foregoing reasons, the decision of the Fifth Circuit Court of Appeal should be affirmed.

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Respectfully submitted,

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